BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHERYL L. PARSONS	)	
Claimant	)	
VS.	)	
	)	Docket No. 227,035
SEABOARD FARMS, INC.	)	
Respondent	)	
Self-Insured	)	

ORDER

Claimant and respondent both appeal from an Award entered by Administrative Law Judge Pamela J. Fuller on November 30, 1998. The Appeals Board heard oral argument July 7, 1999.

APPEARANCES

Lawrence M. Gurney of Wichita, Kansas, appeared on behalf of claimant. Gregory D. Worth of Lenexa, Kansas, appeared on behalf of respondent, a qualified self-insured.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge awarded benefits for a 24 percent permanent partial work disability based on an 18 percent wage loss and a 29 percent task loss. The wage loss was calculated by imputing to claimant a post-injury wage for a job respondent offered. The task loss finding relied on the opinion of Dr. Pedro A. Murati based on a task list prepared by Ms. Karen C. Terrill.

On appeal, both parties challenge the finding regarding nature and extent of disability. Claimant contends the job respondent offered, the one the ALJ used to impute a wage, was not a legitimate offer because it was in a different city and on a night shift. Claimant also contends the ALJ should have given some weight to the task loss opinion of Dr. Murati based on the task list prepared by Mr. Jerry D. Hardin.

Respondent, on the other hand, first argues that the ALJ has not correctly determined the claimant's preinjury average weekly wage. According to respondent, the ALJ has included in the overtime certain other types of pay not properly treated as overtime pay. As to the nature and extent of disability, respondent argues the wage for the post-injury job respondent offered would be equal to 90 percent of claimant's preinjury wage and claimant is, therefore, limited to benefits based on functional impairment pursuant to K.S.A. 1996 Supp. 44-510e.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Award should be modified.

Findings of Fact

1. Claimant worked for respondent for approximately two and one-half years as a secretary and payroll clerk. Her work required repetitive hand activity and she developed problems with her hands, arms, and shoulders. Claimant went first to her family physician and when the family physician advised her the problems might be work related, claimant reported the problems to her employer. The parties have stipulated that claimant suffered accidental injury arising out of and in the course of employment with January 6, 1997, to be treated as the date of accident.

2. After claimant reported her injury, respondent referred her to Dr. Marc-Andre Bergeron for treatment. Dr. Bergeron performed a carpal tunnel release on the left. The surgery did not improve claimant's condition and as a consequence she did not have surgery on the right. Dr. Bergeron also referred claimant to Dr. Pedro A. Murati. Dr. Murati first saw claimant before the surgery. He diagnosed bilateral carpal tunnel syndrome and agreed that she should at least try the surgery on the left. When claimant returned to Dr. Murati after the surgery, she advised she was not happy with the results. Dr. Murati sent claimant for a FCE. The results were invalid, but Dr. Murati testified many of the results from the Southwest Medical Center are reported as invalid.

Dr. Murati recommended permanent restrictions. He advised claimant not to lift more than 20 pounds occasionally, 10 pounds frequently, and 5 pounds constantly. He also advised against hook and knife work and suggested she should work no more than one-half day of repetitive work with 30 minutes on and 30 minutes off. Dr. Murati initially rated the impairment as 15 percent of the whole person but changed the rating to 12 percent because it appeared claimant had full range of motion in the shoulder. Dr. Murati concluded claimant would not be able to return to the clerical job she was doing at the time of the injury.

3. While receiving medical treatment, claimant continued in her clerical position and received a raise January 1, 1998. Respondent modified the duties for this period and

became frustrated because there were things respondent needed to have done which claimant was not able to do with her restrictions. Claimant continued in this modified clerical position until she received permanent medical restrictions.

4. Based on the medical restrictions, respondent agreed claimant could not return to her previous job and reviewed other jobs to determine what job or jobs claimant might be able to perform. Respondent ultimately identified a security guard position as one claimant could perform and offered the job to claimant. Claimant lived in Hugoton, Kansas, and the security guard position was in respondent's pork processing plan in Guymon, Oklahoma, a distance of 40 to 45 miles. The new job offered by respondent also was a third-shift job which began at 10 p.m.

5. Claimant rejected the offer for work as a security guard, indicating she was concerned about the travel at night on the road with little other traffic and was afraid of that type of work at night. She also indicated she had an older car and did not think it would hold up.

6. At the time of the injury involved in this claim, claimant was a full-time employee and earning $8 per hour plus overtime and fringe benefits. Based on the wage statement attached as Exhibit No.1 to the regular hearing, claimant earned a total of $202.80 or $7.80 per week in overtime during the 26 weeks before the accident.[1] Exhibit No. 1 also shows certain premium pay which is not fully explained in the record but appears to be, in part, holiday pay and, in part, vacation pay. Claimant also received fringe benefits or additional compensation with a weekly value of $91.46 which were discontinued as of September 28, 1998.

7. Dr. Murati reviewed two lists of the tasks claimant had performed at work during the 15 years before this accident, one prepared by Ms. Karen C. Terrill and the second from Mr. Jerry D. Hardin. Each list identified tasks that claimant cannot now do with the restrictions recommended by Dr. Murati. Ms. Terrill's list consisted of 14 tasks and indicated claimant cannot do 4, or 29 percent, of the 14 tasks. Mr. Hardin's list contained 38 tasks and indicated claimant cannot now do 25, or 66 percent, of the tasks. Dr. Murati agreed with both. Based on Dr. Murati's testimony, the Board finds claimant has, as a result of this injury, lost the ability to perform 47.5 percent of the tasks she performed in the 15 years before this injury.

8. Claimant last worked for respondent March 23, 1998. Respondent first offered the job as a security guard March 12, 1998, and offered the job again May 5, 1998 at a higher wage. Claimant rejected the offer. Claimant has since looked for employment but

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[1] Respondent's brief suggests we should use the first 13 pay periods shown on Exhibit No.1 but it appears those pay periods represent the first 26 weeks of 1996, not the 26 weeks before the accident in January 1997.

acknowledges she would not accept any employment which paid less than $8 per hour and has fringe benefits. She also acknowledges she has not looked for any employment in Liberal, Kansas, which is 34 miles from Hugoton, and, in fact, has not looked for any employment outside of Hugoton.

9. Mr. Hardin, a vocational expert, testified that claimant could earn $6.75 per hour with the restrictions imposed for her injury.

Conclusions of Law

1. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 1996 Supp. 44-501(a).

2. The Board finds claimant's average weekly wage at the time of her injury was $327.80 and became $419.26 when the fringe benefits were terminated as of September 28, 1998. K.S.A. 44-511 defines average weekly wage for an hourly employee who customarily works 40 hours per week to include a base pay of 40 times the hourly rate plus the average weekly overtime for the 26 weeks before the accident, plus any "additional compensation" as that phrase is defined. In this case, the base pay was $320 (40 x $8 = $320) and the average overtime was $7.80 per week. Additional compensation such as insurance or other fringe benefits are also added to the average weekly wage if the benefits are terminated. Additional compensation does not include holiday or vacation pay. In this case, the parties disagree about how much of the monies shown in the right-hand column of Exhibit No. 1 to the regular hearing should be added to claimant's wage. The Board has concluded that none of these amounts should be included. The document indicates some of these monies were for holiday and vacation and in some cases it is not clear what the money was for. Claimant has failed to meet her burden to show these monies are for "additional compensation" as defined by statute and the Board therefore has not included them.[2]

3. K.S.A. 1996 Supp. 44-510e(a) defines work disability as the average of the wage loss and task loss:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was

[2] The Board acknowledges the average weekly wage found by the Board is less than the wage respondent argues for. But, in our view, the evidence supports only the wage found by the Board and nothing higher.

> earning at the time of the injury and the average weekly wage the worker is earning after the injury.

4. The wage prong of the work disability calculation is based on the actual wage loss only if claimant has shown good faith in efforts at obtaining or retaining employment after the injury. Claimant may not, for example, refuse to accept a reasonable offer for accommodated work. If the claimant refuses to even attempt such work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). Even if no work is offered, claimant must show that he/she made a good faith effort to find employment. If the claimant does not do so, a wage will be imputed to claimant based on what claimant should be able to earn. *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

5. The ALJ found claimant has a 15 percent general body functional impairment based on the opinion of Dr. Murati. Respondent points out that Dr. Murati changed his opinion to a rating of 12 percent of the whole body. Based on the opinion of Dr. Murati, the Board finds claimant has a 12 percent permanent partial impairment to the body as a whole.

6. During the period after the accident while claimant worked for respondent at a wage the same or higher than she was earning at the time of the injury, claimant's benefits would be limited to disability based on the functional impairment of 12 percent. This is the period from January 6, 1997, to March 23, 1998.

7. In this case, the Board concludes claimant's decision not to accept the position offered by respondent does not violate the requirement that she act in good faith in finding additional employment. The position offered as a security guard was drastically different than the type of work she had done and the concerns she expressed about the job appear to be reasonable ones. The combination of these factors does, we believe, distinguish this case from *Swickard v. Meadowbrook Manor*, Docket No. 81,018, ____ Kan. App. 2d ____ (1999). On the other hand, the Board concludes claimant's self-limit to positions which pay what she was making for respondent and limiting her job search to Hugoton do, in our view, violate the requirement that she act in good faith. The Board concludes the wage ability opinion of Mr. Hardin should be used to impute a wage to claimant. He opined that claimant could earn $6.75 per hour which would be $270 per week.[3]

8. Based on the comparison of the imputed wage of $270 per week and the average weekly wage, initially $327.80 and then $419.26 after September 28, 1998, the wage loss is initially 18 percent beginning March 24, 1998, and then after September 28, 1998, becomes 36 percent.

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[3] Mr. Hardin says at page 9 of his deposition claimant could earn $6.75 per hour but then says $205 per week. The Board has used the hourly wage which for full-time work would be $270 per week.

9. Averaging the wage loss and the task loss of 47.5 percent, as required by K.S.A. 1996 Supp. 44-510a, claimant's work disability is initially 33 percent beginning March 24, 1998, and then after September 28, 1998, becomes 42 percent.

10. Claimant would, therefore, be entitled to benefits based on 12 percent general disability and a wage of $327.80 from the date of accident, January 6, 1997, to the date claimant left respondent's employment, March 23, 1998. Although this period is 63 weeks, claimant would receive only 49.8 weeks of benefits during this period because this is the total amount paid for the 12 percent disability.

Claimant would then be entitled to benefits based on a disability rate of 33 percent, again using a wage of $327.80, from March 24, 1998, to September 28, 1998. This is a period of 27 weeks at the rate of $218.54 or $5,900.58. A 33 percent disability would otherwise entitle claimant to 136.95 weeks of benefits, less the 49.8 weeks previously paid, but there are only 27 weeks during this period from March 24, 1998, to September 28, 1998.

After September 28, 1998, claimant became eligible for benefits for a 42 percent disability based on a wage of $419.26. The 42 percent disability would entitle claimant to 174.3 weeks of benefits (415 x 42% = 174.3) but before this period respondent will already have paid claimant for 76.8 weeks. These previously paid weeks should be deducted to leave the 97.5 weeks to be paid at the rate of $279.52 per week (.6667 x 419.26 = 279.52) for a total of $27,253.20.

Claimant's total award is $44,037.07.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Pamela J. Fuller on November 30, 1998, should be, and is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Cheryl L. Parsons, and against the respondent, Seaboard Farms, Inc., a qualified self-insured, for an accidental injury which occurred January 6, 1997, and based upon an average weekly wage of $327.80, for 49.8 weeks of permanent partial disability at the rate of $218.54 per week or $10,883.29 for the 12 percent disability based on functional impairment, followed by 27 weeks at $218.54 per week for a 33 percent work disability during the period March 24, 1998, to September 28, 1998, for a total of $5,900.58, followed by 97.5 weeks at $279.52 per week or $27,253.20, based on a 42% disability and average weekly wage of $419.26, after September 28, 1998. Claimant's total award is $44,037.07

As of August 31, 1999, there is due and owing 49.8 weeks at $218.54 per week or $10,883.29, plus 27 weeks at $218.54 per week or $5,900.58, and 48.14 weeks at $279.52 or $13,456.09, for a total due and owing of $30,239.96, less any amounts previously paid. The remaining $13,797.11 is to be paid at the rate of $279.52 per week for 49.36 weeks.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of August 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Lawrence M. Gurney, Wichita, KS
Gregory D. Worth, Lenexa, KS
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Director